DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 3, 1999

Lydia Annella Anderson, Complainant, v. Newark Public Schools, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 97B00009

FINAL DECISION AND ORDER

Appearances: Eugene G. Liss, Esquire
for complainant

Perry L. Lattiboudere, Esquire, Cherie L. Maxwell, Esquire
Sills Cummis Zuckerman Radin Tischman Epstein & Gross,
for respondent

Before: Honorable Ellen K. Thomas

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA). Lydia Annella Anderson, also known as Lydia Anderson-Powell and as Lydia Powell, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which she alleged that her former employer, the Newark public school system, discriminated against her on the basis of her citizenship and national origin by suspending her and then terminating her from her job as an elementary school teacher. The school district filed an answer denying the material allegations of the complaint and

raising certain affirmative defenses. Discovery and motion practice followed, as a result of which an order was entered (unpub.) dismissing the allegations of national origin discrimination for lack of jurisdiction. A subsequent order was entered on March 9, 1999 granting in part and denying in part the schools' motion for summary decision. Anderson v. Newark Public Sch., 8 OCAHO 1024 (1999).[1]

As to the issues remaining, a hearing was conducted in Newark, New Jersey on June 29, 1999. Witnesses were sworn, testimony was heard, and documents were admitted consisting of Complainants Exhibits 1-15, and 17, Respondents Exhibits A-C, F-H, J, and M-R, and Joint Exhibit 1. The transcript of proceedings was received in this office on July 30, 1999, after which the parties were given until September 10, 1999 to submit proposed corrections to the transcript. The complainant was initially given until September 7, 1999 and the respondent until October 12, 1999 to file proposed findings of fact and conclusions of law. At the request of the parties, these dates were subsequently extended to September 14 and October 26, 1999 respectively. No proposed corrections to the transcript were submitted. However proposed findings were received from the parties on September 14, 1999 and October 26, 1999. On October 26, 1999, the respondent also tendered an initial determination by a New Jersey administrative law judge in a related proceeding, Docket No. EDU-1509-96, and requested that I take judicial notice thereof. I subsequently issued a Notice and Invitation to Comment requesting that any objection to my doing so be filed by November 26, 1999, together with a statement of the grounds therefor. No such objection was made[2] and the case is ripe for adjudication.

II. APPLICABLE LAW

Except as limited by law, by contract, or by the constitution, an employer, including a public employer, generally has the right to retain or dismiss a nontenured or probationary employee as it sees fit. Mozier v. Board of Educ., 450 F.Supp. 742, 747 (D.N.J. 1977) (nontenured teacher's

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[1] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 7, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

[2] On November 26, 1999 a letter was received from an attorney who has never entered an appearance in this matter requesting a thirty-day extension. The letter was returned as an attempted ex parte communication because there was no indication it had been served on opposing counsel.

employment is terminable upon whatever notice is provided in the contract); Dore v. Board of Educ., 449 A.2d 547, 552 (N.J. Super. Ct. App. Div. 1982) (boards of education have almost complete right to terminate the services of a teacher who has no tenure). Cf. Blanding v. Pennsylvania State Police, 12 F.3d 1303, 1307 (3d Cir. 1994) (unlike tenured state trooper who is permanent employee, probationary trooper has no property right in continued employment). Among the statutory restrictions on an employer's right to fire an employee are a variety of federal civil rights laws.

One of these is the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b(a)(1), which prohibits employers from discriminating against any protected individual with respect, inter alia, to discharge from employment, because of the individual's citizenship status. To prevail on a claim of disparate treatment under § 1324b, a complainant must demonstrate knowing and intentional discrimination. 28 C.F.R. § 44.200. As in any lawsuit, the complainant may prove her case by either direct or circumstantial evidence. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).

Absent direct evidence, an inference of discriminatory intent is customarily established as an initial matter pursuant to the paradigm developed in a long line of cases beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in which the Supreme Court has described the evolving framework for disparate treatment analysis in a discrimination case. In Furnco Construction Corp. v. Waters, it was observed that: "[T]he central focus of the inquiry in a case such as this is always whether the employer is treating . . . some people less favorably than others." 438 U.S. 567, 576-77 (1978). Disparate or differential treatment is thus the essence of a discrimination claim. In the words of the Supreme Court, referring to the discrimination prohibited by Title VII: "The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The complainant in such a case bears the burden of proving by a preponderance of the evidence that the respondent engaged in intentional discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

To make a prima facie showing in a discharge case pursuant to the formulation established by McDonnell Douglas and its progeny, a plaintiff ordinarily must demonstrate that: (1) she belongs to a protected group, (2) she was qualified for her job, (3) she was discharged, and (4) other employees not in the protected class were treated more favorably than she was. Weldon v. Kraft, Inc., 896 F.2d 793, 796 (3d Cir. 1990) (citing Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)). See generally Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, (3d Cir. 1999) (burden of establishing prima facie case of sex discrimination); Simpson v. Kay Jewelers, Inc.,142 F.3d 639 (3d Cir. 1998) (burden of establishing prima facie case of age discrimination); Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637-38 (3d Cir. 1993) (prima facie case of

race discrimination). The elements are not inflexible, and the precise nature of the showing required will depend to some degree upon the factual circumstances of the particular case.[3]

Where a claim of disparate treatment is based on comparative evidence, the complainant's case must rest on proof that the proposed analogue is similarly situated in all the relevant respects. Dill v. Runyon, 1997 WL 164275 *4 (E.D. Pa. Apr. 3, 1997). Determining who is or is not a similarly situated employee involves a fact-intensive and case-specific inquiry. See generally Nguyen v. ADT Eng'g, Inc., 3 OCAHO 489, at 929-930 (1993) (laid off engineer failed to show that retained engineers were similarly situated where his professional skills and work habits were inferior to theirs). In a hiring or promotion case, the appropriate comparison will ordinarily be between the relative qualifications of the applicants. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 529 (3d Cir. 1993), cert. denied, 510 U.S. 826 (1993). The Third Circuit looks for some objective criteria on which to base such a comparison. See id.. Where discipline and discharge are at issue however, the focus of the inquiry will not be on the complainant's qualifications but on such factors as the relative culpability of the conduct of the individuals sought to be compared, the presence or absence of mitigating or aggravating circumstances, the disciplinary histories of the individuals involved, i.e. whether there was a single incident or a cumulation of incidents precipitating the adverse action, and the relative severity of the penalties imposed. See generally Lex K. Larson, Employment Discrimination §12.09 (2nd ed. 1997).

The Supreme Court has cautioned that in comparing employment discipline decisions, "precise equivalence in culpability between employees" is not the standard. The question is whether the misconduct was of "comparable seriousness." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976). As was observed in Shirley v. James River Corp., 1996 WL 250044 *5-6 (D.Del. Apr. 11, 1996),

> In sorting out plaintiff's claim of disparate discipline under Title VII, the Court must balance the need to compare only discipline imposed for like offenses with the reality that the comparison will inevitably not involve exactly the same type of work-related offenses under the same sets of circumstances [citation omitted].

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[3] Although some cases in the circuit have suggested with respect to the fourth prong of the formula that a terminated plaintiff must show that she was replaced by someone outside the protected class, see, e.g., Walton v. Mental Health Ass'n, 168 F.3d 661, 667 (3d Cir. 1999), Pivirotto, 191 F.3d at 353-54, explains why this is too narrow a characterization. Cf. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) (age discrimination plaintiff is not required to show replacement by someone outside the protected class). The most inclusive formulation is one which says that the fourth prong in a firing case can basically be satisfied by any evidence which demonstrates that the plaintiff lost her job under circumstances which give rise to an inference of discrimination. See, e. g, Waldron v. SL Indus., 56 F.3d 491, 494 (3d Cir. 1995).

Nevertheless, the court noted that the most important variables in a disciplinary context necessarily are "the nature of the offenses committed and the nature of the punishments imposed." Id. at *3. Like other circuits, the Third Circuit examines the totality of the circumstances to determine whether employees are similarly situated, and the complaining party bears the burden of proof. Kay Jewelers, 142 F.3d at 645.

Once a prima facie case is established, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the termination. See generally Burdine, 450 U.S. at 254. If the employer does so, the aggrieved individual may still prevail if he or she can demonstrate that the employer's reasons are a pretext for prohibited discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). The ultimate burden of persuasion remains at all times with the complainant.

The McDonnell Douglas formulation is not to be rigidly or mechanically applied; it is simply a convenient method of allocating the relative burdens of production. Once a case has been fully tried on the merits, the inquiry need not focus unduly upon the order of proof, but rather on the ultimate question of whether, considering the totality of the evidence, the defendant intentionally discriminated against the plaintiff. Aikens, 460 U.S. at 715.

III. UNDISPUTED FACTS

The partial summary decision previously entered found it to be established without contradiction that Lydia Anderson was an elementary school teacher licensed as such by the state of New Jersey since at least 1989 and that she became a full-time teacher under contract with the Newark Public Schools on or about September 8, 1992. Anderson had become a lawful permanent resident of the United States on October 1, 1990. She subsequently became a United States citizen on June 5, 1996. It was also established that on July 12, 1995, the state of New Jersey removed the local school board which was previously in charge of Newark's public schools and assumed control of the city's school system. At all relevant times since then the Newark school system has been a state operated school district pursuant to N.J.Stat.Ann. § 18A:7A-1 to 52 (1989), repealed in part by Comprehensive Education Improvement and Financing Act, P.L. 1996, ch.138 § 85. Under N.J.Stat.Ann. § 18A:7A-15.1 the state district superintendent of schools assumed the authority and all the powers which had previously been vested in the local district's board of education.

It was also found that Anderson was employed as a fourth grade teacher at the Bragaw Avenue School in Newark from September 1992 until she was suspended from that job with pay on November 22, 1995. The explanation given for her suspension was contained in a letter signed by Beverly L. Hall, then the Acting Superintendent (Exhibit P8), which states,

> Please be advised that pursuant to N.J.S.A. 18A:6-8.3 you are hereby suspended with pay from your duties and assignments as a teacher in the Newark School District pending an

> investigation of allegations of inappropriate conduct. The suspension is to take effect immediately. You will be advised of any further action which may be taken.

Anderson was thereafter terminated on December 14, 1995. The reason given was gross misconduct based on unprofessional and inappropriate conduct as a teacher. Her termination letter, signed by John A. Nolan, Acting State District Assistant Superintendent (Exhibit P9), cites two specific incidents:

> On November 15, 1995, you permitted and otherwise failed to prevent an adult relative from beating a fourth (4^{th}) grade pupil (S.J.) in your class. You also failed to report this incident to your principal or the Division of Youth and Family Services. On October 26, 1995, you directed two (2) pupils (D.M. and R.B.) to stand in class as punishment. When pupil (D.M.) became tired and sat down, you lifted his desk and took his chair. You then engaged in a "tug of war" with the pupil for a chair, resulting in his falling down and risking injury. Your actions were egregious and unprofessional. Since you are a non-citizen, your employment status is non-tenured pursuant to N.J.S.A. 18A:28-3. Your termination is effective today.

The dismissal of tenured teachers in New Jersey is governed by the procedures set out in N.J.Stat.Ann. § 18A:6-11. It was undisputed that a tenured teacher charged with the conduct attributed to Anderson would have been entitled to a pretermination hearing, but Anderson was not eligible for tenure because she was not at that time a citizen of the United States and N.J.Stat.Ann. § 18A:28-3 prohibits the awarding of tenure to persons other than United States citizens. The partial summary decision previously entered held that § 18A:28-3 was within the exception clause of 8 U.S.C. § 1324b(a)(2)(C), and accordingly that the school district did not violate § 1324b in not affording Anderson the benefit of tenure or of the procedural protections afforded a tenured teacher. 8 OCAHO 1024, at 10-11. It found as well that because she did not avail herself of the contractual grievance procedures or otherwise invoke the mechanism set out in the applicable collective bargaining agreement between the school system and the Newark Teachers' Union (Exhibit D accompanying the school system's motion to dismiss), she was not entitled to the benefit of the four-step grievance process set out in Article III, Section 2 of the contract, which would have provided her with 1) a discussion with a supervisor, 2) a written grievance and meeting, 3) an appeal to the Executive Superintendent, and 4) binding arbitration. Id. at 11-12. The order further observed that the only procedural requirement in the bargaining agreement which was independent of the grievance machinery appeared to be that set out in Article V Section 1B, which called for an informal conference between the employee, his or her representative, and the appropriate administrator prior to the suspension, discharge or separation of an untenured employee.

The previous order also found that as a lawful permanent resident at the time of the events in question, Anderson was a protected individual within the meaning of 8 U.S.C. § 1324b, that she had consistently received performance evaluations which were satisfactory or better (Exhibits P10, P11, P12) but that she nevertheless suffered the adverse employment actions of being

suspended and discharged. As to the fourth prong of her prima facie case, Anderson submitted the Certification of Pietro Petino which asserted that Margaretta Urguhart, an untenured citizen teacher, was interviewed with respect to allegations against her and was permitted to defend herself with representation while Anderson was summarily terminated, and that Petino had been personally told by Dr. Nolan that because Anderson was not a citizen she would not be given an opportunity either to be told what she was being investigated for, or to explain her actions. Although the statement was not in such form to be admissible at a hearing, I took its assertions as true, as is required at the summary decision stage, and found it sufficient to preclude summary adjudication and to require a hearing to test its credibility. 8 OCAHO 1024, at 13-14 (1999). See generally 28 C.F.R. §68.38(e).[4] Cf. Lawrence v. National Westminster Bank New Jersey, 98 F.3d 61, 67 (3d Cir. 1996) (not appropriate on summary judgment to weigh disputed evidence or decide which is more probative).

The purpose of conducting a hearing was thus not to determine in the abstract whether the school district conducted a timely or sufficient investigation or complied with its own policies when it suspended and terminated Anderson,[5] although such a failure may be one circumstance contributing to a finding of discrimination. See generally EEOC v. Hall's Motor Transit Co., 789 F.2d 1011, 1014-15 (3d Cir. 1986). The purpose of conducting the hearing was to give Anderson the opportunity to prove her allegation that the school district treated similarly situated citizen teachers more favorably and discriminated against her on the basis of her citizenship status.

IV. EVIDENCE PRESENTED

Witnesses appearing for the complainant included Anderson herself, Ella Taylor, and Pietro Petino. Wilma Findley testified on behalf of the schools. Both parties presented documentary evidence as well. In addition, a transcript of the testimony before the New Jersey Office of Administrative Law was made a part of the record containing additional testimony from Anderson and Findley as well as by Carolyn King, a substitute teacher at Bragaw School, S.N.J., the child who was involved in the beating incident on November 15, E.L.M., an uncle[6] of S.N.J

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[4] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1999).

[5] A state agency hearing was convened on August 10-11, 1998 to address the questions of the adequacy of the investigation, and whether the school district had complied with its own policies in terminating Anderson. Administrative notice is taken that an initial decision was subsequently issued on September 29, 1999 finding that Anderson was not denied due process of law, that she had received a statement of reasons for her dismissal, and that she had no entitlement to a hearing prior to her suspension or termination.

[6] Although identified elsewhere as the father of S.N.J., he appears to be an uncle having a custodial or guardianship relationship with her.

and the adult involved in that incident, and Robert Copeland, currently Assistant Superintendent of the state operated school district, but in 1995 the Acting Assistant Executive Superintendent.

Anderson testified that she started working for the Newark schools in 1989 as a part time teacher. A permanent position opened for her in 1992 at Bragaw Avenue school, and she worked at that school continuously until 1995. She was in her classroom at Bragaw on November 22, 1995 when Principal Findley's secretary paged her to come to the office. Findley gave her a sealed envelope containing a suspension letter, after which she went home. She said that prior to receiving the letter she had not been told she was going to be charged with anything. Once she got the letter, she telephoned the board of education four times trying to speak to Dr. Hall, the superintendent, but she was informed by the secretary that Dr. Hall wouldn't talk to her because there was going to be "a legal battle."

Anderson said she had no conversation with anyone from the board between the time she was handed the suspension letter and the time she received the termination letter. She received one months pay for the period prior to her termination. No one from the board ever called her about any investigation being conducted, nor did she ever meet with anyone about the suspension letter. She said she never spoke with Ms. Findley about the beating incident nor did Findley ever ask her about this incident. The only time she ever had a meeting with Findley and the union representative, Ella Taylor, was on October 13, 1995 at 1:40 p.m. after being called away from her classroom by Findley about another matter having to do with her teaching standards and her making phone calls to the mother of a particular student. She said she did write a memo to Findley about the beating incident, in response to Findley's request for a written statement. In fact she gave the handwritten memo to Findley that same day, even before it was requested, because it was her custom to report any incidents taking place in the classroom to Findley. The next morning she gave Findley the memo in typewritten form. Both versions are dated November 15 (Exhibits P5 and P6), and state in pertinent part,

> You accompanied [S.J.]'s uncle to my classroom this afternoon during my instructional teaching time .... You will recall that you spent a considerably (sic) length of time talking with [S.J.]'s uncle at my classroom door. After you left my classroom door [S.]'s uncle whipped her in the classroom with a belt.

That was the only written submission she made to Findley about this incident. Two days after the incident, on the morning of November 17, 1995, the Vice Principal, Lillian Burke, came to Anderson's classroom and took Anderson's students out into the hallway. She didn't really know what Burke was asking them about. Anderson said the children were very angry and upset when they came back about the way she was being treated. Anderson also said she never had any meeting with Petino and the board of education about the beating incident.

Ella Taylor testified that she taught at the Bragaw Avenue Elementary School for twenty five years prior to her retirement on February 1, 1999. At the time of the events at issue Taylor said she was also that school's building representative for the Teachers' Union. As such, she

enforced the contract and attended meetings whenever a teacher had to meet with an administrator. She became aware of the beating incident because Anderson came to her room and told her about it the next day. She said she did not meet with Anderson and Findley about this incident, but she did have a meeting about it with Anderson and the Vice Principal, Ms. Lillian Burke, prior to Anderson's suspension. The meeting took place in Ms. Burke's office at some point during the week following the beating incident, and it lasted about forty to fifty minutes. They discussed the incident and the question was raised as to why Anderson did not intervene between the parent and the child. Taylor said her own role at the meeting was mainly to be a witness and to take notes in case a grievance was filed. After the meeting she directed Anderson to the union office, but she never saw a grievance. The conclusion of the meeting was that Anderson was going to go to the union office and Ms. Burke advised Anderson that she might be suspended based on the incident.

Pietro Petino identified himself as the Executive Director of the Newark Teachers' Union. His duties as such include representation of employees, filing grievances, arbitration, negotiations and meetings with administrators. He is familiar with suspension proceedings, which are the same for nontenured and tenured teachers. Prior to the takeover of the Newark schools, the former board of education would send copies of suspension notices to the union because of the representation clause in the contract. The person would be sent home with pay pending the outcome of an investigation. There used to be an investigative unit, but that unit was laid off. Now an investigation might be done by an assistant superintendent or by the employee relations department. Eventually the person would get a hearing or a meeting. Petino said he believed he was at a meeting on November 22 when Anderson was suspended, but said it is hard to remember because he has represented hundreds of people. He does remember her bringing in the termination letter which surprised him because it wasn't a normal procedure. According to the contract she was supposed to get 30 days notice. Also, a nontenured teacher would not normally be notified by mail of a termination, they would usually be brought in. Petino said he did call Dr. Nolan and complain about the procedure because he thought Anderson was entitled to be heard and to get 30 days notice. He had several conversations with Nolan trying to get her a hearing. Petino also testified that in one of those conversations Dr. Nolan told him that Anderson had no rights because she was not a citizen and didn't have to be treated like the others. Nolan told him that he should look up the statute. Petino said he initially thought Anderson was tenured because of her years of service, but he later came to find out she was not. Usually a teacher with certification and three years and a day of satisfactory performance would be entitled to tenure. That's what the statute provides. It was Dr. Nolan who first made him aware that Anderson didn't have tenure, because he, Petino, does not have the right to look at an individual's file.

Petino also testified about two incidents involving disciplinary proceedings for two other teachers. One incident occurred a couple of years ago, and involved a nontenured teacher, Marguerita[7] Urguhart. He thought she taught at E.M.Flanks School. She had also been the

[7] This appears to be the same individual identified in Petino's prior certification as Margaretta Urguhart.

subject of disciplinary proceedings in which he represented her, and she was exonerated. The allegation against her was not substantiated. He did not remember whether she had been suspended with pay or what the investigation consisted of, but he thought that she had been given a hearing. It was a couple of years ago. He does not recall any specifics about a hearing but said "I would have to believe she did" have a hearing, since she is still employed. To the best of Petino's recollection, the allegation may have involved child abuse. He said in practice the union isn't always notified where there is an administrative summons. Some administrators just bring them in. Article V Section 16 of the union contract provides that a teacher summoned to an interview by an administrator has the right to representation, but the individual has to request it; it's not automatic.

The other incident occurred a few months ago when Mark Oropollo,[8] a nontenured teacher, was charged with inappropriate conduct. Oropollo's suspension letter (Exhibit P17) is dated March 5, 1999 and signed by the Director of Labor and Employee Relations. Petino said that Oropollo was suspended with pay, but was later given notice he would not be rehired for the upcoming year. His suspension letter bears the heading "Re: Investigatory Interview," and states:

> Please report to the Labor and Employee Relations Department at 11:30 a.m. on Wednesday, March 10, 1999, to review the incident that allegedly occurred between you and a ten (10) year old youth on February 19, 1999. This meeting may have an impact on your future employment. You are entitled to bring a union representative to the meeting.

Petino said he attended the meeting, which took well over an hour. Questions were asked and Oropollo gave testimony. The procedure used in 1999 is not like the procedure that would have been used in 1995 or 1996, but is still similar in that the teacher would be notified. The difference is the investigation would not be by the investigative unit but by someone from the central office. In this case, it was someone from employee relations. It also might be the principal or administrator of the building.

Wilma Findley identified herself as the Principal of the Bragaw Avenue Elementary School, a position she has held for five years. In this capacity, she was Anderson's immediate supervisor at the time of Anderson's suspension and discharge. She stated that the tug of war incident initially came to her attention because a student was hurt when he fell on a chair. She made a report to the central office about this incident, and discussed the incident with Anderson on the same day, after Anderson saw the nurse. With respect to the beating incident, she stated that she was called by a substitute teacher who had heard some noise and had gone to investigate. The substitute teacher then informed Findley about the incident. Findley said the adult relative had already left by then, but after she spoke to the child involved, she called Mr. Copeland and followed his instructions to call the Department of Youth and Family Services (DYFS) and to

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[8] Oropollo's name is consistently spelled in the transcript as "Aropolo." His suspension letter (Exhibit P17), however, is addressed to Mark Oropollo, presumably in accordance with his personnel records, and I have utilized this latter spelling throughout as more probably correct.

speak with the other individuals involved. She said she spoke with Anderson and asked her what happened. She asked Anderson for a written statement as well. A memo dated November 16, 1995 from Findley to Anderson captioned "Request for Written Statement" (Exhibit P7) states,

> It has come to my attention that a child was publicly whipped in your presence with a leather belt by an adult male relative. I require a written statement from you concerning this matter.

Findley said she also spoke to the other children in the class and to the adult relative, E.L.M., as well. She typed up a memo of the responses of the children to her questions (Exhibit C). The memo indicates that the same three questions were asked of each student: whether the student was there when [S]'s father came to class, what the student saw, and what Anderson did. She wrote down what they said.

Findley said she had meetings that year at various times with Anderson, but not about the beating incident except for a brief exchange the same day. These meetings were generally about instruction or about complaints from parents. She met with Anderson about the tug of war incident, but Ms. Baldwin, the vice principal, was the one who met with Anderson and Taylor about the beating incident. That would have been after Findley had talked to Mr. Copeland. Normally there would be a written report of such a meeting. That report would have gone down to the Board with the package of materials about the incident.

When there is an incident that could lead to discipline, Findley's responsibility as principal is first to meet with the teacher regarding whatever the incident is. If the incident involves child abuse, her instructions are to call DYFS to report it, then to call the Assistant Superintendent to give as much preliminary information as she has. After looking into it, she makes a written report. Discipline itself comes out of the assistant superintendent's office.

Findley said she did not know anything about Anderson's citizenship status at the time of the suspension, but the procedure would have been the same regardless. The decision to suspend Anderson was not made by her, nor did she make any recommendation as to whether Anderson should be suspended or discharged. Those decisions would have been made by the District Superintendent. Mr. Copeland called and told her to deliver the suspension notice to Anderson personally and she did so in her office. Petino was not present on that occasion. She had no contact with Anderson after that.

Findley thought that Copeland was also the person who made the decision to terminate Anderson, but she herself had no part in that decision. He is the Assistant Superintendent in charge of Cluster 3 schools and as such the "boss" for Bragaw School. She would not ordinarily receive anything back from DYFS about the results of any investigation by them other than a notice that they decided not to investigate. She never heard anything back about the incidents involving Anderson.

E.L.M. testified that Findley called him at home a few days after the beating incident and asked him to come down to the school and discuss the incident with her, and he did so. That would have been around November 17th or 18th. He explained to her what had happened in the classroom on the 15th.

Copeland identified himself as the Assistant Superintendent for School Leadership Team Three, but said in 1995 that he was Acting Assistant Executive Superintendent. His duties in 1995 included responsibility for the general administration of 16 schools primarily in the south ward of Newark. At that time, investigation of incidents was generally in the hands of either the school administration or the security department. He said that he became aware of several incidents involving Anderson and recalled having several discussions with Findley about her, but he did not currently have any specific recollection of a discussion about the beating incident. He has notes of a phone conversation about Anderson dated in November but this discussion was about lack of appropriate supervision of students. He did recall the discussions about the tug of war incident and about leaving students unsupervised. His special assistant met with the parent of the child involved in the tug of war incident. The parent wanted to set up a meeting with Findley and Anderson but he doesn't know if that meeting ever took place. There was a written "report of incident called in" dated October 27, 1995 about this incident (Exhibit B).

He had discussions with Nolan about suspending and terminating Anderson. He remembered indicating that tenure charges would have to be filed because Anderson had been in the district for more than three years. Nolan later informed him that Anderson did not have tenure and could be terminated without filing tenure charges. He did not have any specific recall of discussing the contents of termination letter with Nolan, but that would have been the practice. He also could not remember whether he met personally with Findley, but he did have several telephone conversations with her.

It is technically the Superintendent who takes action to suspend and terminate, based on the recommendations of other administrators. In a state operated school district there is no board of education so there would be no resolution to terminate passed by a board. The full power to hire or terminate rests with the Superintendent.

V. DISCUSSION

The ultimate issue in any discrimination case is whether the employer intentionally discriminated against the employee. Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061,1066 (3d Cir. 1996) (en banc), cert. denied, 521 U.S. 1129, 117 S.Ct. 2532 (1997). In the final analysis, the showing Anderson must make in order to prevail upon her claim is to prove by a preponderance of the evidence that her citizenship status was a "determinative factor" in the decision to suspend and terminate her, so that "but for" her citizenship status she would not have been suspended or discharged. Bellisimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986). That determination must be based on the totality of the evidence.

> A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.

Bray v. Marriott Hotels, 110 F.3d 986, 991 (3d Cir. 1997) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990)).

Anderson's evidence considered as a whole ultimately did not support the conclusion that discrimination based on her citizenship status was the reason for her suspension or termination. Neither was she able to show that a nontenured United States citizen teacher who engaged in similar conduct and who failed to invoke contractual grievance procedures was treated more favorably than she was. Accordingly, she did not meet her burden of proof.

It became very clear in the course of these proceedings that the professional relationship between Anderson and Findley was far from cordial and that they had ongoing conflicts and problems. However I credit Findley's testimony that she was unaware of Anderson's citizenship status at the time she reported either of the incidents which led to Anderson's suspension and termination to the central office, and that Findley herself took no part in the decisions to suspend or terminate Anderson beyond the reporting of the two incidents. At the time of Anderson's suspension, moreover, it does not appear that anyone in the school administration was actually aware of Anderson's citizenship status either, or of the fact that she did not have tenure. The witnesses other than Anderson seemed to agree that the suspension procedures would be the same, whether or not a teacher had tenure. With respect to termination, those procedures would differ. In fact, Copeland said he initially believed that tenure charges would have to be filed and tenure proceedings followed in order to effect Anderson's termination. The facts about Anderson's citizenship status, and her consequent untenured status, apparently came to light at some point between the decision to terminate her and the actual implementation of that decision. Once it was determined that the schools did not need to file tenure charges, they proceeded directly to termination. Anderson vigorously contests their right to do so.

Although Petino testified that there was a 30 day notice provision in the contract, he never identified the specific contract to which he referred. Neither the current union contract nor the one in effect at the time of Anderson's termination was placed into evidence by either party. What provisions are contained in the current union contract is, of course, not relevant to what procedures were required at the time of Anderson's termination. The contract applicable to her termination was made an exhibit at the summary decision stage; as was found in my prior order granting partial summary decision, Anderson failed to invoke the grievance procedure in Article III and therefore was not entitled to the procedures in that Article, and Article V Section 1B required only that an informal conference be held some time prior to the suspension, discharge or separation of an untenured employee. There is no mention in that provision of any 30 day or other notice or waiting period, nor was there any other evidence corroborating Petino's suggestion that a 30 day notice period was required. If Anderson had an individual contract with such a provision, it was not brought forward.

The requirement in Article V Section 1B that an informal conference be had prior to a nontenured employee's suspension or discharge appears to have been satisfied by the meeting Taylor testified took place between herself, Anderson and Vice-Principal Burke, during the week after the beating incident and before the suspension. I found Anderson's claim that she did not know the reason for her suspension to be disingenous in light of Taylor's testimony that Anderson came to her classroom the day after the beating incident and told her about it, that it was subsequently discussed at a meeting with the Vice Principal, that Anderson's failure to intervene between the adult and the child was specifically questioned at that meeting, and that it was stated there that disciplinary measures might result. The suspension letter plainly advises Anderson that she is suspended pending an investigation of allegations of inappropriate conduct. Anderson's own testimony was that she wrote a memo to Findley about the beating incident even before Findley requested her statement; she evidently viewed the incident as significant. She further testified that on November 17th, the Vice Principal took her students from the classroom for questioning. She spoke with the students after they were questioned that day, and she said that they wrote out statements about what happened. In view of this testimony, I do not credit that Anderson was unaware of the reason for her suspension or of the fact that there was an investigation.

A complainant's burden at the hearing stage requires more than is needed to overcome a summary judgment motion. In addition to proving the elements of her prima facie case, Anderson's burden was also to show that the schools' proffered nondiscriminatory reasons for the employment decision were false, and that prohibited discrimination was the real reason for the acts complained of. It is beyond cavil that Anderson proved the first three elements of a prima facie case by a preponderance of the evidence: as a lawful permanent resident she was a member of a protected class, her performance evaluations were always satisfactory or better so she was qualified for her job, and she suffered the adverse actions of suspension and termination. At the summary decision stage she had also presented some evidence of what appeared to be more favorable treatment of a United States citizen teacher which I found sufficient to preclude summary decision and to require a hearing. The evidence brought forward at that hearing, however, failed to establish by a preponderance of the evidence that Urguhart, the person to whom Anderson sought to compare herself, or any other employee was in fact similarly situated. Because Anderson ultimately was unable to show either that the sanctions imposed on her were more severe than the sanctions imposed on a similarly situated citizen teacher, or that Urguhart or any other similarly situated citizen teacher was afforded greater procedural protections than she was, her evidence was ultimately insufficient to raise an inference of discrimination.

Support for Anderson's allegation that persons outside her protected class received more favorable treatment than she did essentially rests on the uncorroborated anecdotal testimony of Pietro Petino about Marguerita Urguhart and Mark Oropollo, two untenured employees both of whom were involved in disciplinary proceedings some years after Anderson was. Investigation of the allegations against Urguhart evidently showed that she did not do whatever it was that she had been charged with. Oropollo was suspended, then notified of the nonrenewal of his contract, for reasons which remain unknown. While Petino was a generally credible witness, his

testimony about Marguerita Urguhart has little probative value because it was both too general and too speculative, and his memory was demonstrably less than keen. He thought, for example, that he was present on November 22 when Anderson received her suspension letter, although other evidence made it clear that he was not. He didn't really remember very much about Urguhart and acknowledged that he was basically guessing when he said that he "would have to believe" she had some kind of hearing or meeting. Neither was there any specific testimony as to what either Urguhart or Aropolo was actually charged with, or whether they had invoked the four-step grievance procedure.

Even assuming arguendo that events occurring years after Anderson's termination could provide an appropriate basis for comparison,[9] Anderson still needed to show that the conduct of those employees was comparable in seriousness to her own, and that the discipline imposed upon her was more severe than that imposed on them. In order to make a showing that another employee is similarly situated in a discipline or discharge case, it is first necessary to prove that the other employee engaged in the same or similar conduct. This requires some showing of what the employees offered as comparators actually did or were accused of doing. For example, in Stinson v. Delaware River Port Authority, 935 F.Supp. 531, 540 (D.N.J. 1996), the plaintiff was discharged for falsifying a doctor's note to excuse her absences, thus violating a work rule prohibiting giving false information to a supervisor. She sought to compare herself to others who had violated the same rule, but the court found that those employees were not similarly situated where the specific infractions committed by the others were "dramatically different in kind or magnitude" from her violations. Different disciplinary measures taken in response to different conduct engaged in by employees with different work records do not constitute disparate treatment. Miller v. Yellow Freight Sys., Inc., 758 F.Supp. 1074, 1079 (W.D. Pa. 1991). A complainant must carry the burden of proof on this issue.

With respect to Urguhart and Oropollo, the two employees Anderson offered as comparators, she did not set forth sufficient facts to furnish a basis upon which to make a meaningful comparison or to find either of them similarly situated. Her evidence was barren of detailed information, not only about what specific conduct these employees were charged with, but also about their previous disciplinary histories, whether their discipline was for a first or subsequent offense, and whether or not there were differentiating or mitigating circumstances which distinguished their conduct or treatment from hers. Similarly, there was no factual basis provided upon which to assess the relative depth of the investigations conducted in these cases, the thoroughness of the documentation, or even whether or not these other employees had initiated contractual grievance

[9] The schools specifically objected on relevancy grounds to the receipt in evidence of Oropollo's suspension letter. I admitted it, although I found it only marginally relevant.

procedures.[10] Neither is it at all apparent in what manner Anderson contends that Oropollo was better treated than she was, notwithstanding that as a nonrenewed teacher he had specific statutory rights to which she was not, as a terminated teacher, entitled.[11]

I cannot conclude on the basis of the evidence put forward that the discipline imposed upon Anderson was more severe than that imposed on similarly situated noncitizen teachers or that any similarly situated noncitizen teacher received procedural protections denied to her. While Anderson insisted that other nontenured employees had hearings and Petino used that term as well, he acknowledged on cross-examination that he used the term loosely to refer to a "meeting" or other informal discussion, not necessarily to any formal type of proceeding with sworn testimony as is usually connoted by the term "hearing." He could not actually remember, moreover, whether Urguhart even had a hearing or a meeting, only that he thought she "must have" since she was still employed by the school system. While Anderson denied ever having a meeting or being permitted to present her version of the facts, it appears from other credible testimony that a meeting took place with the Vice Principal and the union's building representative prior to Anderson's suspension for the specific purpose of addressing the beating incident, and that Findley had solicited a written statement from Anderson about what happened in her classroom that day. Far from being denied an opportunity to present her view of the facts, her account of this incident was actively sought, albeit not in the forum she might have preferred.

Even had Anderson been able to prove a prima facie case, moreover, she failed to show that the reasons set forth in her termination letter were a pretext for discrimination. Once the employer offers a nondiscriminatory reason, the complainant must prove that the employer's reason is false and that discrimination was the real reason for the employment decision. 509 U.S. at 515. In order to discredit the proffered reasons, Anderson would have had to show "such weaknesses, implausibilities, inconsistencies, incoherences or contradictions" in the schools' explanation that a reasonable factfinder would find the reasons unworthy of credence. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

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[10] Notwithstanding Anderson's efforts to recast this as a constitutional claim that she was denied due process, she offered no explanation for her own failure to invoke the grievance mechanism provided in the collective bargaining agreement, which would, if utilized, have led to a four-step process culminating with arbitration.

[11] Nonrenewal of an annual contract is not a dismissal or a disciplinary action. See generally Marlboro Twp. Bd. of Educ. v. Marlboro Twp. Educ. Ass'n, 690 A.2d 1092, 1093 (N.J. Super. Ct. App. Div. 1997), cert. denied, 697 A.2d 544 (N.J. 1997). N.J.Stat.Ann. § 18A:27-3.2 entitles a nonrenewed teacher to a statement of reasons upon request made within 15 days of notification of nonrenewal. N.J.Stat.Ann. § 18A:27-4.1 provides that a nonrenewal notice also entitles an untenured teacher to an "informal appearance" before the board upon request. There are no comparable provisions for terminated teachers.

The evidence presented did not suggest that Anderson's citizenship status was a factor in her suspension and termination, or that the schools' explanation was a cover-up for a discriminatory motive. Neither did it show that any similarly situated teacher was more favorably treated. As Petino acknowledged, the statement Nolan reportedly made to him that Anderson had no rights because she was not a citizen could well have been made in connection with the tenure question: that is, that Anderson had no tenure rights because she was not a citizen. The rights which Anderson did have were the same rights that any nontenured citizen teacher who failed to invoke applicable grievance procedures would have had, no more and no less.

CONCLUSION

I have considered the pleadings, the documentary and testimonial evidence, the memoranda and other submissions submitted by the parties, and the partial summary decision previously entered. All motions and other requests not previously disposed of are denied. On the basis of the record and for the reasons stated, I make the following findings of fact, conclusions of law and final order:

FINDINGS

1. Lydia A. Anderson is a teacher licensed as such by the state of New Jersey since at least 1989.

2. On or about September 8, 1992, Anderson, who at that time had been a lawful permanent resident of the United States since October 1, 1990, became a full-time elementary school teacher under contract with the Newark Public Schools.

3. Lydia A. Anderson's performance evaluations for 1993, 1994 and 1995 were satisfactory or better.

4. On July 12, 1995, the state of New Jersey removed the Newark local school board and assumed control of the Newark school system.

5. Anderson was employed by the Newark school system as a fourth grade teacher at the Bragaw Avenue School from 1992 until December 14, 1995.

6. Anderson was suspended from her job with pay on November 22, 1995 and terminated altogether on December 14, 1995.

7. Anderson was terminated based on two instances of unprofessional and inappropriate conduct as a teacher.

8. Prior to Anderson's suspension, she had an informal meeting with Lillian Burke, the Vice Principal of Bragaw Avenue school, and Ella Taylor, the union's building representative for Bragaw.

9. Anderson's citizenship status was not a factor in the schools' decision to suspend or terminate her.

10. At no time prior to her suspension or termination was Anderson given a hearing.

11. A tenured teacher charged with the same conduct as Anderson would have been entitled to a hearing prior to being terminated.

12. A nontenured teacher charged with the same conduct as Anderson and who invoked the grievance procedure set forth in the applicable collective bargaining agreement would have been entitled to the four-step procedures set forth at Article III of that agreement.

13. Anderson did not file a grievance about her suspension or discharge.

14. Lydia A. Anderson became a United States citizen on June 5, 1996.

15. Lydia A. Anderson filed a charge with the Office of Special Counsel (OSC) on February 10, 1996.

16. On June 17, 1996 OSC sent Anderson a letter authorizing her to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

17. Lydia Anderson filed a complaint with OCAHO within ninety days of her receipt of OSC's notification letter.

CONCLUSIONS

1. Anderson's complaint was timely filed with OCAHO.

2. All conditions precedent to this proceeding have been satisfied.

3. Newark Public Schools at all times relevant to this action was a state operated school district under N.J.Stat.Ann. § 18A:17A-1 to 52 (1989).

4. Lydia A. Anderson at all times relevant to this action was a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

5. N.J.Stat.Ann. § 18A:28-3 provides that in order to acquire tenure as a teaching staff member in the state's public schools, an individual must be or become a citizen of the United States.

6. N.J.Stat.Ann. § 18A:28-3 is a state law within the exception clause of 8 U.S.C. § 1324b(a)(2)(C).

7. The school district's failure to follow the procedures set out in N.J.Stat.Ann. § 18:A6-11 et seq. in terminating Anderson did not violate 8 U.S.C. § 1324b.

8. Anderson was not entitled to the contractual grievance procedures set forth in Article III of the applicable collective bargaining agreement because she failed to file a grievance about her suspension and termination.

9. Anderson failed to prove a prima facie case of discrimination based on her citizenship status.

10. The respondent school district provided a legitimate nondiscriminatory reason for suspending and discharging Anderson.

11. To the extent any statement of material fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth as such.

ORDER

Anderson's complaint should be, and it hereby is, dismissed.

SO ORDERED.

Dated and entered this 3rd day of December, 1999.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i)(1), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.